COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. 35 CENTS PER NUMBER.

NOTES.

MODERN DEVELOPMENTS OF THE DOCTRINE OF CONTRACTS IN RESTRAINT OF TRADE.—The original meaning of a contract in restraint of trade was one by which a person agreed not to exercise a certain calling, Y. B. 2 Hen. V. 5, pl. 26; *Homer* v. *Ashford* (1825) 3 Bing. 322, the abhorrence of which at common law arose principally from the fact that a person might thus be deprived of a means of earning a livelihood, *Steam Nav. Co.* v. *Winsor* (U. S. 1893) 20 Wall. 64; *Oliver* v. *Gilmore* (1892) 52 Fed. 562, and also that the State was deprived of the services of a useful member. *Union Steamboat Co.* v. *Bonfield* (1901) 193 Ill. 420; *Mitchell* v. *Reynolds* (1711) 1 P. Wms. 181. Though at first the courts absolutely prohibited such contracts, *Colgate* v. *Bacheler* (1602) Cro. Eliz. 872, they were later upheld, if ancillary to some other contract, the enjoyment of which they were necessary to protect. *Broad* v. *Jollyse* (1619) Cro. Jac. 596. But since the protection of the contractor was usually accomplished by a contract confined to certain limits, they were upheld only where limited in time and space, *Rogers* v. *Parry* (1613) 2 Bulstr. 136, this arbitrary rule being subsequently changed to a test of what was reasonably necessary for the protection of the contractor. *Nordenfelt* v. *Maxim Nordenfelt etc. Co.* [1894] A. C. 535; 2 COLUMBIA LAW REVIEW 166. While the tendency of such a contract to destroy competition and create monopoly was also considered one of the evils caused by such contracts, no stress was put upon this fact, see *Mitchell* v. *Reynolds*, supra, and the rules regarding such contracts were not framed to meet it.

Recently the courts of this country, because of peculiar economic conditions prevailing here, have built up, as an extension of the older doctrine, *U. S.* v. *Addyston Pipe Co.* (1898) 85 Fed. 271, new doctrines prohibiting contracts which tend to lessen competition and to create

monopoly. The nature of these more recent branches and the principles which should be applied to them present questions over which there has been some controversy. 4 COLUMBIA LAW REVIEW 318. It has been contended that there is only one doctrine underlying the modern development. *U. S.* v. *Addyston Pipe Co.*, supra. But in reality there are two classes of contracts to be considered. See *Rafferty* v. *Gas Co.* (N. Y. 1899) 37 App. Div. 618, 622. Denominating the older form of contracts in restraint of trade as Class I, we have in the latter extensions—Class II, those contracts which, though restricting competition and perhaps covering the entire competitive field, tend toward monopoly only in a loose sense; and Class III, contracts tending toward monopoly in the more exact and restricted sense of a great power secured by contract of exercising a practically exclusive control over a market of extended character. The general subject being to a considerable extent an economic one its proper classes are made more apparent by a consideration of the economic evils which each is supposed to create. In Class II the injury is primarily to the consumer because of the danger which is caused to his interests. *Texas Standard Oil Co.* v. *Adoue* (1892) 83 Tex. 650. In Class III, on the other hand, the injury is to the State, as such—the danger arising from the inconsistency with the principles of a republic, of aggregations resulting from such contracts and the power which those controlling such excessive concentrations of wealth would have over the interests of citizens. *Richardson* v. *Buhl* (1889) 77 Mich. 632; *People* v. *Refining Co.* (1890) 121 N. Y. 582, 625 semble; *Lufkin Rule Co.* v. *Fringeli* (1898) 57 Oh. St. 596, 608.

Regarding the doctrines against contracts of the two later classes as, at least, nominal extensions of the original "restraint of trade" doctrine, *Alger* v. *Thacher* (Mass. 1837) 19 Pick. 51, we may consider whether any of its principles are applicable to them. The chief characteristic of the old doctrine was the test of reasonableness applied there. Since contracts of Class II are no more fundamentally dangerous to the State than those of Class I, and since, on the other hand, persons whose business is being destroyed by modern competition are as much in need of protection as the tradesman in making his ancillary contract, the test of reasonableness is logically to be applied to Class II, *Central Shade Roller Co.* v. *Cushman* (1887) 143 Mass. 353, 364; *Ives* v. *Smith* (1888) 3. N. Y. Supp. 645, 654, though not along the same lines as in Class I, different interests being balanced, *Nat. Benefit Co.* v. *Hospital Co.* (1891) 45 Minn. 272, 276; *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473, 483, and territorial limitations being irrelevant. *Texas Standard Oil Co.* v. *Adoue*, supra. On the other hand the enforcement of contracts in Class III, being inherently dangerous to the State, no question of reasonableness enters, *State* v. *Standard Oil Co.* (1892) 49 Oh. St. 137, 186, nor does the fact that it is ancillary to some other lawful contract excuse the existence of the danger. *Lufkin Rule Co.* v. *Fringeli*, supra 607 et seq.

It must be confessed that this classification is by no means universally accepted. No distinction is ordinarily made between contracts tending toward monopoly in the more exact sense indicated above and contracts covering the field of competition but not tending toward monopoly in that sense. Both are grouped in Class III and arbitrarily refused enforce-

ment. The result is that no provision is made against the enforcement of contracts not covering the entire field of competition but yet restricting competition in an unjust and extortionate manner; while contracts of the more extended field though not in any way tending are refused enforcement though reasonable. See *More* v. *Bennett* (1892) 140 Ill. 69.

A recent decision in Kentucky forcibly illustrates the necessity of distinguishing all three classes. *Clemons* v. *Meadows* (1906) 94 S. W. 13. A contract by which one of the only two hotel keepers in a town agreed with his rival not to run his hotel for three years was held unenforceable. The decision seems *prima facie* to be contrary to the early rule that contracts in restraint of trade are enforceable if confined to a particular place. But since the contract is not ancillary to any other, it cannot be upheld as a reasonable contract of Class I. The contract is better, however, treated as one of Class II. Here the point of limited area is not material, and since the contract concerned a quasi-public institution, *People* v. *Chicago etc. Co.* (1889) 130 U. S. 268, 293, and was not shown to be necessary under the circumstances, it is clearly unreasonable and therefore unenforceable. *Anderson* v. *Jett* (1889) 89 Ky. 375; *Chapin* v. *Brown* (1891) 83 Ia. 156. On the other hand, to suppose a reasonable contract of this sort, restricting competition to prevent ruinous results of previous rivalry, there is no doubt that such a contract should be upheld. Yet it is impossible to reach these proper results, if but one classification is adopted for II and III. Under such a classification, contracts of this character, in which the entire field of competition is covered, would necessarily be considered, it would seem, from the same standpoint as those tending toward a true monopoly, and the reasonable contract in the hypothetical case would be condemned together with the unreasonable one in the principal case. On the other hand, if because of this incongruity, it were held that the cases did not fall within the class at all, the contract in the principal case with its unwarranted evil to the consumer would be enforced, except where it could be brought under the narrow theories of Class I, which is wholly inadequate to meet modern exigencies.

FORMER JEOPARDY UNDER INDICTMENTS ERRONEOUSLY HELD INSUFFICIENT FOR VARIANCE.—Where a defendant has been brought to trial on a valid indictment, the panel completed and issue joined, the jeopardy attaches, and any other prosecution for the same offense is barred, unless the defendant waives his right. 1 Bishop, Crim. Law § 978 et. seq. But if there is a material defect in the indictment, *Black* v. *State* (1867) 36 Ga. 447, or a material variance between the indictment and the proof, *State* v. *Stebbins* (1861) 29 Conn. 463, in which case there could be no valid judgment, the defendant is not deemed to have been put in jeopardy. The question arises, what is the effect of arresting judgment, or directing a verdict of acquittal, or quashing the indictment under the erroneous belief that the indictment is invalid or insufficient. It is admitted to be the general rule that the dismissal of the indictment against the objection of the defendant does not deprive him of his right to plead former jeopardy on the second prosecution. *Lee* v.